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413074—41

# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 525

STANLEY R. HEMPHILL, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 367–371) is reported in 120 F. (2d) 115.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 3, 1941 (R. 371), and a petition for rehearing was denied July 2, 1941 (R. 372). The petition for writ of certiorari was filed August 19, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish the fraudulent scheme for the operation of which petitioner was convicted under the mail fraud statute.

2. Whether reversible error resulted because government counsel, after a defense witness had testified in support of petitioner's claim of good faith, asked the witness on cross-examination whether he had not at one time stated that he would advise petitioner to plead guilty.

3. Whether reversible error arose from the government's interrogation of an alleged victim of the fraudulent scheme regarding the disposition by the petitioner of a typewriter which the witness had delivered to petitioner as part payment in one of the allegedly fraudulent transactions.[1]

## STATEMENT

Petitioner and two others were indicted in the District Court for the Western District of Washington on eight counts charging violation of the mail fraud statute (18 U. S. C. Section 338) and

[1] A fourth "error" relied upon in the petition (Pet. 12) is that the facts referred to by the Circuit Court of Appeals in its review of the evidence are "consistent with innocence." This issue is not substantially distinguishable from Question No. 1, above.

on a ninth count charging a conspiracy to violate that statute (18 U. S. C. Section 88) (R. 2–28). The indictment alleged that the defendants engaged in a fraudulent scheme to secure money from persons who could be induced to enroll in courses in diesel mechanics and engineering or in electrical refrigeration and air conditioning at schools conducted by the defendants, by misrepresenting that these schools were well established and widely respected, well equipped with tools and machinery for practical training and with a capable staff of teachers for theoretical instruction (R. 3–4).

Petitioner was convicted upon all counts except the third and ninth (R. 29), and was sentenced to imprisonment for 21 months (R. 33–34). In affirming this conviction the Circuit Court of Appeals for the Ninth Circuit stated that it was "precluded from questioning the sufficiency of the evidence" by petitioner's failure to move for a directed verdict at the close of all the evidence. 112 F. (2d) 505, 506. After this Court granted certiorari (311 U. S. 634) upon a petition raising the same questions presented by the present petition, the Government filed a brief answering petitioner's contentions on the merits, but conceding that a remand with instructions to consider the sufficiency of the evidence would be warranted in view of the doubt concerning whether the court below had examined the evidence sufficiently to assure

itself that the conviction was not plainly erroneous.[2] Accordingly this Court reversed and remanded with directions to consider the sufficiency of the evidence, 312 U. S. 657.

Thereafter the Circuit Court of Appeals rendered the decision now sought to be reviewed. The court below concluded that petitioner's conviction was supported by evidence "which excluded every other hypothesis save that of guilt" (R. 371).

## ARGUMENT

The issues raised by the present petition were fully treated in our brief on the merits in No. 369, October Term, 1940. We here summarize the arguments made in that brief at pp. 12–37.

### I

The evidence of petitioner's guilt was more than sufficient. After an earlier unsuccessful venture called "Diesel Power Engine Schools" (R. 295) petitioner in 1935 began operating as "Hemphill Trade Schools" with an office at a mailing bureau (R. 278). Although he had no school room for instruction and "only offices for research work," petitioner offered two weeks shop training as part of a course in diesel engineering (R. 278, 297). Following complaints to the local prosecuting attorney by petitioner's brother who operated trade

[2] See Government's brief in Case No. 369, October Term, 1940, at p. 11.

schools under the name of Hemphill, petitioner adopted the name "International Engineering Institute" (R. 280, 295–296, 299) and, under the name of the "International Air Conditioning Institute," also began advertising for students in air conditioning and refrigeration (R. 279, 281).

When students who had enrolled in the diesel course upon the representation that there would be shop training, complained of the lack of equipment, petitioner said he did not have enough students to pay him to put in the equipment (R. 69–71). He also endeavored to switch complainants to air-conditioning courses at a higher tuition stating that the diesel was "dying out" and that air conditioning was now "the big thing," although then and thereafter he was advising new diesel students that it was "America's most rapidly growing industry" (R. 69, 76–78, 155–156, 164, 203, 246). Petitioner indicated to one of his instructors that he did not expect to make good on his promise of shop training since his experience had shown that ninety percent of the students dropped out before they completed the course on theory and that "enough lessons were given, and they were hard enough so that possibly the other 10% would drop out" (R. 164). There was also evidence that petitioner's salesman engaged in still grosser misrepresentations, e. g. that the Government was helping students get through the school (R. 72, 81–82), that the school furnished transportation to Seattle (R.

85, 99, 102, 103), that the organization had schools all over the country and in foreign countries (R. 153, 157, 190–192).

Petitioner's testimony in his own behalf (R. 275–305) contradicted in some particulars the testimony given against him by his students and instructors and by other government witnesses. We submit, however, that such conflicts were properly referred to the jury for determination and that the evidence supporting its conclusion that petitioner was guilty is convincing.

II

Petitioner complains that it was improper for the District Attorney to inquire of a character witness whether he had not stated that he would advise the defendant to plead guilty (Pet. 11). The witness, Sullivan, was petitioner's attorney of record but did not participate in the trial (R. 308). His testimony went far beyond the confines of character testimony, and dealt with his professional advice to petitioner in connection with the various school enterprises (R. 307–308). He stated, among other things, that petitioner had led him to believe "he would use his every effort" to live up to his contracts (R. 308). Under the circumstances it was proper impeachment of the witness' direct testimony in support of petitioner's good faith to inquire whether the witness had not stated that he would advise petitioner to plead guilty. See 2

*Wigmore on Evidence* (3d ed.) Secs. 1017–1023. And since the witness denied having made any such statement no prejudice resulted from this incident.

III

Petitioner urges that the witness Colhour was erroneously permitted to testify concerning facts from which it might have been inferred that petitioner had stolen a typewriter (Pet. 11–12). Colhour had agreed to take a course in air conditioning and had delivered the typewriter to petitioner under an arrangement by which petitioner was to sell it and apply the proceeds on Colhour's tuition fee. The witness then testified that petitioner later told him that the typewriter was missing and that petitioner had not returned or accounted for it (R. 255–256). It was clearly competent for the Government to show the arrangement between the petitioner and Colhour with respect to the latter's paying for the course. The fact that it was remotely possible to infer from the testimony that petitioner had wrongfully disposed of the typewriter could not render inadmissible testimony which was otherwise competent. *Moore* v. *United States,* 150 U. S. 57, 61.

CONCLUSION

Petitioner points to no conflict of decisions or other special or important reason for granting cer-

[illegible] in this case. His conviction was just. We therefore respectfully submit that he petition should be denied.

[illegible] Hart,
*Acting Solicitor General.*

William L. Hyde,
*Assistant Attorney General.*

[illegible] A. Provost,
[illegible] B. Southard,
*Attorneys.*

September 1903.